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Supreme Court of the United States

October Term, 1973

No. 73-276

NORMAN A. LANDRY
Petitioner

v.

HEMPHILL NOYES & CO., ET ALS
Respondents

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

There were no District Court opinions, reported or unreported. The opinion of the Court of Appeals for the First Circuit (App. A to Petition) is reported at 473 F.2d 365.

QUESTIONS PRESENTED

1. Is there any conflict between the Court of Appeals decision in this case and either that of the Seventh Circuit in *Buttrey* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.* (410 F.2d 135) or that of the Second Circuit in *U.S.* v. *Peltz* (433 F.2d 48)?

2. Was petitioner denied due process of law or equal protection of the laws because of the delay, expenses and other problems he encountered in prosecuting this action?

3. May an at least partially successful civil litigant obtain Constitutional relief on the basis of his dissatisfaction with the performance of his retained attorneys?

4. Does petitioner or the record in this case raise any generally significant questions of Federal law?

STATEMENT

This is a civil action brought by a dissatisfied customer of the brokerage house of Hemphill, Noyes & Co. against that house, the manager of its Worcester office (Walter Winchester) and a former registered representative in that office (Philip J. Murphy). It is based on the handling of the account of plaintiff (now petitioner) with that office during the years 1962-4.

As set forth in the complaint upon which the action was tried,[1] (A. 67-73),[2] plaintiff made essentially two claims, first, that his account had been excessively traded or

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[1] Actually this was the "Second Amended Complaint" (A. 67). It was filed and allowed in June, 1968 (A. 8).

[2] Record references in this brief are as follows: A. — Appendix of pleadings, etc.; Tr. — Trial transcript; Ex. — Exhibits as contained in separate bound volumes; Pet. — the instant petition for certiorari.

"churned" and second, that he had been extended excessive credit in violation of Regulation T of the Federal Reserve Board. Defendant's answer included a counterclaim for a debit balance of just under $10,000 left when plaintiff's account was closed out in June, 1964 (A. 78-9).

Following extensive discovery and motion practice, there was a ten day jury trial in February, 1971. During this period, plaintiff was represented by three different law firms (A. 4, 7, 9, 13). The case was tried by his third set of counsel.

The evidence adduced at trial may be briefly summarized as follows:

The plaintiff-petitioner lives in Holden, Massachusetts, is a high school graduate and served in World War II (Tr. 51-2). Since 1946 he has been in the insulating, painting and carpentry contracting business with his father and a brother-in-law (Tr. 184, 188-90). He made his first stock market transaction in 1953 (Tr. 53, 190-1) and was active in the market for the next three years (Tr. 54-6, 808-25, Ex. CC). He traded on margin and made one short sale (Tr. 198-201, 815-6). From 1956 to 1962, he continued to trade but less actively (Tr. 59-62, 208-220, 838, Exs. A, B, H, I).

In mid-1962, he commenced doing business with the individual defendant Murphy at the Hemphill Noyes Worcester office. Mr. Murphy handled the Landry account through August, 1963 (Tr. 109, 901). During the period July, 1962 to August, 1963, there were a total of 77 transactions in the account (Exs. 4-G through 5-0, 11A & B). Commencing in March, 1963, there were a number of short sales and subsequent purchases of the same stocks (Exs. 5-D through 5-0, 11A & B). The principal securities involved were Xerox, Chrysler and Control Data (Ibid).

As the market was generally rising, selling short resulted in losses (Tr. 917-8, 408). In August, 1963, Mr. Landry asked to have his account shifted to Ernest Anger, another registered representative in the Worcester office and a prior social acquaintance of his (Tr. 110, 328-9, 1005-6). Mr. Anger handled the account until late January or early February, 1964 (Tr. 332, 1012-5). During this five-months period there were some 32 transactions in the account (Tr. 332-3, Exs. 5P through 6B, 11B and C). These included further short sales. (Ibid).

Following further losses and an unanswered written demand for additional margin, the account was liquidated in May, 1964 (Tr. 133-5, Ex. 6I and J, 11C, 19). This liquidation left a debit balance of $9,989.58 (Ex. 6I, Tr. 340).

Throughout the entire period, Mr. Landry had regularly been receiving confirmations of each transaction and monthly statements (Tr. 255-6, 270-2). (Copies of the statements are Exs. 1 through 6 and A and B. Copies of the confirmations for 1962-4 are Exs. 8-10). Except on one occasion when Mr. Murphy sold the wrong securities, Mr. Landry made no complaints to anyone regarding the handling of his account until May, 1964 (Tr. 268-70, 276, 913-5).

The amount of credit a brokerage house may extend to a margin customer was and is controlled by Regulation T of the Federal Reserve Board.[3] Following the close-out of the Landry account, it was discovered that serious errors had been made by the margin clerk handling the account (Tr. 733-7). At trial, the expert witnesses for both sides

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[3] 12 CFR §220. The actual percentage margin a customer must put up is controlled by §8 of the Regulation (12 CFR §220.8) which is amended from time to time. During the 1962-4 period, a customer had to post a 50% and later a 70% margin (Tr. 409, 489, 742).

were in substantial agreement that there had in fact been overextensions of credit on 14 transactions on 9 different dates (see Tr. 739). 11 of these transactions were totally on overextended credit. 3 involved only partial overextensions (Tr. 740-8).

Two witnesses testified to the losses sustained by Mr. Landry on the transactions made on overextended credit. Petitioner-plaintiff's expert gave a total figure of $56,280.42 (Tr. 590). Defendants' expert reached a total of $41,162.00 (Tr. 755).

At the conclusion of the trial, the Court in effect directed verdicts for Hemphill, Noyes on its counterclaim and for the individual defendants Winchester and Murphy on the claim based on overextension of credit (Tr. 1106) and the remainder of the case was submitted to the jury together with special interrogatories under F.R. Civ. P., Rule 49(b) (Tr. 1154-6. A. 241).

The jury returned verdicts as follows: on the churning claim — $5,000 against Hemphill, Noyes, $1,000 against Winchester and $500 against Murphy (A. 239-41. Tr. 1161-2); on the claim for overextension of credit — $51,280.42 against Hemphill, Noyes (A. 241. Tr. 1163). The defendants thereafter successfully filed motions for judgment n.o.v. on the churning claims (A. 243-8, 251-3). As amended, but including interest, the judgment against Hemphill, Noyes totalled $65,040.63 (A. 251).

Petitioner appealed and his trial counsel declined to represent him on appeal (A. 250e). Hemphill, Noyes responded with a cross-appeal (A. 254-6). The Court of Appeals affirmed and subsequently denied petitioner's application for a re-hearing. The instant petition followed.

ARGUMENT

I.

THERE IS NO CONFLICT BETWEEN CIRCUITS

Petitioner, a layman appearing pro se, asserts that the decision of the First Circuit in his case is in conflict with both *Buttrey* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 410 F.2d 135 (7th Cir. 1969) cert. den. 396 U.S. 838 and *U.S.* v. *Peltz*, 433 F.2d 48 (2nd Cir. 1970), cert. den. 401 U.S. 955 (Pet. 55-78(a)). Each is discussed briefly below.

Buttrey was an action by the trustee in bankruptcy of a small broker-dealer firm against the nationwide house of Merrill Lynch. The trustee claimed that Merrill Lynch allowed the financially irresponsible president of the bankrupt firm to use its facilities to speculate with customers' funds and failed to properly supervise bankrupt's account. In reversing a summary judgment for the defendants, the Seventh Circuit held that a violation of the "know your customer" provision of New York Stock Exchange Rule 405 may under some circumstances be civilly actionable. See 410 F.2d at 141-3.

Petitioner's attempt to relate the instant case to *Buttrey* is rambling and consists in large part of attempts to reargue the evidence and to reassert a motion to amend which was denied in 1970 (Pet. 55-73). However, it would appear that what he is contending is that the courts below should have recognized that his evidence showed violations by Hemphill Noyes of New York Stock Exchange Rules 345, 401, 405 and 431 (See Pet. 63-72).

Even if the evidence supported petitioner's claims that these rules were violated, the fact remains that the case was tried and considered by the courts below on two entirely different theories of liability, namely, churning and

losses resulting from violations of Regulation T. Neither of these was present in *Buttrey*. Moreover, in contrast to Buttrey's specific reliance on Rule 405, the Landry trial complaint (A. 67-73) mentions only one New York Stock Exchange Rule, Number 431 which is a margin rule (quoted at Pet. 70). Nor is there any reference to, or consideration of, stock exchange rules in the First Circuit opinion.

Accordingly, petitioner is trying to create a conflict with *Buttrey* by asserting a theory which is outside the pleadings and which was not ruled upon by the Court of Appeals. Nor is there any substantial factual similarity between this case and *Buttrey*.

Peltz was a criminal prosecution of a lawyer for conspiracy to defraud the United States by dishonestly obtaining advance information from a Securities and Exchange Commission employee and for violations of the Securities and Exchange Act of 1934 and its attendant rules by false statements to brokers as to stock ownership while placing sell orders.

There is no obvious resemblance or connection between *Peltz* and the instant case but petitioner attempts to erect a bridge by asserting that Peltz's conviction was based upon his misrepresentations to his brokers that he was selling "long" when in fact he was selling "short" (Pet. 74). He then asserts that essentially similar misrepresentations were made in the confirmations and statements sent him by Hemphill Noyes (Pet. 74-8).

The factual analogy between willful criminal misstatements by a customer and apparent bookkeeping mistakes in monthly statements is farfetched at best. More important, it is clear that the First Circuit opinion never reaches the issues discussed in *Peltz* and considered Hemphill Noyes' "erroneous bookkeeping" only in connection with the mea-

sure of damages for Regulation T violations. See 473 F.2d at pp. 372-3.

There is thus little, if any, significant factual or legal overlap between this decision and *Buttrey* or *Peltz* and certainly nothing resembling a clear conflict between the Circuits on any point of law, large or small.

II.

THERE IS NOTHING TO PETITIONER'S CLAIMS THAT HE WAS DENIED DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAWS

Petitioner claims that "THERE IS EVIDENCE THAT THERE WAS A CONSPIRACY TO DENY PETITIONER A JUST, SPEEDY AND INEXPENSIVE DETERMINATION OF HIS ACTION (OBSTRUCTION OF JUSTICE) WHICH DENIED PETITIONER DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAWS UNDER THE FOURTEENTH AMENDMENT" (Pet. 71).

His argument on this point is most kindly described as hard to follow and would seem to amount to a general contention that everyone involved in the litigation, including the District Court and his own counsel, were out to do him in.

To the extent that specific points can be identified, petitioner attempts under this head to reargue certain evidentiary rulings, especially with respect to the measure of damages (Pet. 79-84). Not only were these rulings affirmed by the Court of Appeals but it borders on the ridiculous to suggest that, even if erroneous, such rulings in a civil case would amount to a violation of Constitutional rights.

Petitioner further claims that he was denied a "speedy" trial (Pet. 79. See also Pet. 22-8). There are several obvious answers to any arguments based on the fact that this action was not tried until about seven years after it was filed. First, there is no showing that the defendants moved for continuances or were otherwise responsible for delay. Second, petitioner shows absolutely no loss of witnesses or other prejudice from the delay. And third, it is transparent from the record that the major cause was petitioner's difficulties with his various counsel and his apparent problems between 1968 and 1970 in obtaining new counsel.[4] However, these difficulties were his own and cannot be laid at the door of either defendants or the District Court or otherwise form the basis for appellate relief.

Finally, petitioner laments at length regarding various actions or inactions of his several attorneys, including the post-trial efforts of his trial counsel to collect their fees (Pet. 83-7. See also Pet. 21-9, 32-4). See in particular his contention that he "was subjected to psychological violence from the Court and his attorneys" (Pet. 83). Whatever may be the situation in criminal cases involving assigned

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[4] The docket entries show that the plaintiff was at various times represented in the District Court by three different firms.

The action was originally filed in June, 1964 by Verne L. Vance, Esq. of Foley, Hoag & Eliot (A.4). On October 10, 1966, this firm was allowed to withdraw (A.7).

A month later, Monroe Inker, Esq. of Crane, Inker & Oteri then entered an appearance for plaintiff (A.7). Mr. Inker and his firm were in turn granted leave to withdraw on January 11, 1968 (A.7).

The plaintiff then appeared pro se until James G. Reardon, Esq. of Hartwell, Driscoll, Reardon & Driscoll entered an appearance on March 25, 1970 (A.9). On November 20, 1970, Mr. Reardon and his partner Mr. Keenan also attempted to withdraw (A.11) but their motion was denied and the case was in fact tried for plaintiff by Mr. Keenan. Messrs. Keenan and Reardon subsequently declined to represent plaintiff on appeal (A.250e).

counsel, defendants know of no instance wherein a civil plaintiff's dissatisfaction with his own retained attorneys has been the basis for Constitutional relief. Defendants further somewhat ruefully note that, far from losing their client's case, petitioner's trial counsel recovered a judgment for some $65,000.00.

III.

PETITIONER RAISES NO GENERALLY SIGNIFICANT QUESTION OF FEDERAL LAW

With respect to at least four of the issues he attempts to raise, petitioner "submits that its public importance is obvious and that it was wrongly decided below" (Pet. 61, 73, 74, 78). No doubt these issues are both emotionally and financially important to petitioner personally. The test is, however, the importance of the issues "to the public as distinguished from" importance to the parties involved. *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U.S. 387, 393. *Rice* v. *Sioux City Cemetery*, 349 U.S. 70, 79.

Applying this test to the present case, it may first be noted that this is a strictly private dispute between one customer and one stockbroker with two of the latter's employees as additional defendants. There are no class allegations and no suggestion that the interests of anyone other than the immediate parties are involved.

Second, stockbroker-customer disputes have been well known to the Courts for at least a century and neither of the basic claims set forth in the amended complaint (churning and over-extensions of credit) represents any new development or innovative theory of law. See generally

Note, Churning By Securities Dealers, 80 Harv. L. Rev. 869 (1967); Note, Federal Margin Requirements as a Basis for Civil Liability, 66 Colum. L. Rev. 1462 (1966).

Third, this case was in large part decided on its own particular facts after a ten day jury trial. More specifically, three of the major issues presented by petitioner to the Court of Appeals were dismissal of the individual defendants, judgment n.o.v. on the churning claims and the refusal of the District Court to submit a separate claim form for fraudulent practices. See 473 F.2d at pp. 373-4. Each of these turned on deficiencies in petitioner's proof in this particular case and thus seems essentially unique to the present litigation and certainly of no general significance.

IV.

AS TO PETITIONER'S APPEAL THE COURT OF APPEALS DECISION WAS CLEARLY RIGHT

The portion of the Court of Appeals opinion which deals directly with the points raised by petitioner appears at 473 F.2d 372-4. A brief examination of those pages shows one quite obvious application of §28(a) of the Securities Exchange Act (15 U.S.C. §78bb(a)) in affirming what amounted to a directed verdict on defendant Hemphill Noyes' counterclaim and thereby preventing a double recovery, an almost equally clear application of the "netting-out" principles of Regulation T to the measure of damages for violations of that regulation and holdings that on three points petitioner's proof was insufficient to create jury questions.

None of these issues is legally particularly com
difficult and it is submitted that on each the Court
peals was clearly right.[5]

CONCLUSION

For the foregoing reasons, this petition for a writ
tiorari should be denied.

Respectfully submitted,

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[5] The appeal did present one novel and probably quite
question, namely, the measure of damages where there h
only a partial overextension of credit. See 473 F.2d at
370-1. However, this was raised exclusively by defenda
decided against them and they have not petitioned or ce
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